

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**



76-1156

*original with proof  
of service*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

DOCKET NO. 76-1156

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*P/5*

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE

VS

JOHN ANTHONY HOUSAND,

DEFENDANT-APPELLANT

WILLIAM H. CLENDENEN, JR.  
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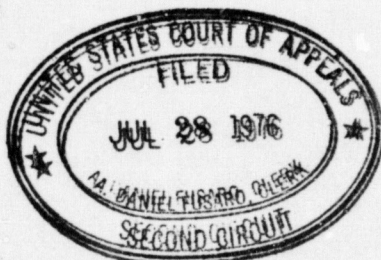


TABLE OF CONTENTS

Table Of Citations.....	ii
Statement Of Issues.....	1
Statement Of the Case.....	2
Argument.....	6
I. THE DISTRICT COURT ERRED WHEN IT REFUSED TO ORDER JOSEPH N. CRISAFI TO TESTIFY UNDER PENALTY OF CONTEMPT.....	6
A. Introduction .....	6
B.1.The Grant Of Immunity Supplanted Mr. Crisafi's Fifth Amendment Privilege.....	7
B.2.If Mr. Crisafi Perjured Himself Before The Grand Jury, Mr. Housand Was Entitled To Discover Whether the Government Knew of the Perjury Prior to Trial.....	9
B.3.If the Government Knew That Mr. Crisafi Perjured Himself Before the Grand Jury, Mr. Housand Would be Entitled to a Dismissal of the Indictment.....	10
C. Mr. Crisafi Waived His Fifth Amendment Privilege Against Self Incrimination.....	11
D. The District Court's Imprimatur on Mr. Crisafi's Blanket Refusal To Testify Was Plain Error.....	11
E. The District Court Had a Duty to Examine the Sealed Grand Jury Testimony for the Existence of Brady Material.....	13

II.	THE DISTRICT COURT'S INSTRUCTIONS ERRONEOUSLY BARRED THE JURY FROM FINDING THAT HOUSAND HAD BEEN COERCED AND COMPELLED TO GIVE FALSE TESTIMONY.....	14
III	THE DISTRICT COURT DENIED APPELLANT HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.....	28
IV	COUNT II AND IV OF THE INDICTMENT WERE FATALLY DEFECTIVE BECAUSE THE QUESTIONS WERE IMPRECISE...	33
	A. COUNT II .....	33
	B. COUNT IV.....	35
V	THE GOVERNMENT'S USE OF HOUSAND'S STATEMENTS OF FEBRUARY 14, 18 and 19, 1975 VIOLATED THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.....	37
VI	THE DEFENDANT CLAIMS TO HAVE BEEN INEFFECTIVELY REPRESENTED BY COUNSEL IN THE PROCEEDINGS BELOW. THIS COURT SHOULD REMAND TO THE DISTRICT COURT TO CONDUCT A HEARING AND MAKE A RECORD ON HIS CLAIM.....	40
VII	THE DISTRICT COURT'S INSTRUCTIONS FAILED TO SPECIFY EACH ELEMENT OF THE SUBSTANTIVE OFFENSE CHARGED AS THE OBJECTS OF THE CONSPIRACY.....	42
	CONCLUSION.....	44

	Page
Table Of Citations.....	ii

#### Cases Cited

<u>Barker vs Wingo</u> , 407 U.S. 514 (1972)	29
<u>Beatty vs United States</u> , 389 U.S. 45 (1967) (per curiam), reversing 377 F.2d 181 (5th Cir. 1967)	38
<u>Berger vs United States</u> , 295 U.S. 78 (1935)	9
<u>Bronston vs United States</u> , 409 U.S. 352 (1973)	33
<u>Ellis vs United States</u> , 416 F.2d 791 (D. C. Cir. 1969)	11
<u>Goldberg vs United States</u> , 472 F.2d 513 (2nd Cir. 1973)	7
<u>Hancock vs White</u> , 378 F.2d 479 (1st Cir. 1967)	38
<u>Housand vs United States</u> , Civil No. H-75-305	23, 28
<u>Ingram vs United States</u> , 360 U.S. 672 (1958)	42
<u>In Re Liddy</u> , 506 F.2d 1293 (D.C. Cir. 1974)	7
<u>Johnson vs Zerbst</u> , 304 U.S. 458 (1938)	38
<u>Kastigar vs United States</u> , 406 U.S. 441 (1972)	7, 8
<u>Klopper vs North Carolina</u> , 386 U.S. 213 (1967)	29
<u>Kranick vs United States</u> , 343 F.2d 436 (9th Cir. 1965)	8
<u>Machibrada vs United States</u> , 368 U.S. 487 (1962)	41
<u>Massiah vs United States</u> , 377 U.S. 201 (1964)	37
<u>Massimo vs United States</u> , 339 F.Supp. 519 (S.D.N.Y. 1972), aff'd. on other grounds, 463 F.2d 1171 (2nd Cir. 1972)	40

<u>McLeod vs Ohio</u> , 381 U.S. 356 (1965) (per curiam), reversing <u>State vs McLeod</u> , 1 Ohio St. 2d 60, 203 N.E. 2d 349 (1964)	38
<u>McMann vs Richardson</u> , 397 U.S. 759 (1970)	40
<u>Mesarosh vs United States</u> , 352 U.S. 1 (1956)	9
<u>Miranda vs Arizona</u> , 384 U.S. 436 (1966)	38
<u>People vs Colgan</u> , 377 N.Y.S. 2d 602 (App. Div. 1975)	24
<u>Pereira vs United States</u> , 347 U.S. 1 (1954)	42
<u>R. I. Recreation Center vs Aetna Casualty &amp; Surety Co.</u> , 177 F.2d 603 (1st Cir. 1949)	24
<u>Sanders vs United States</u> , 373 U.S. 1 (1963)	41
<u>Shannon vs United States</u> , 76 F.2d 490 (10th Cir. 1935)	24
<u>Strunk vs United States</u> , 412 U.S. 434 (1973)	31
<u>United States vs Alter</u> , 482 F.2d 1016 (9th Cir. 1973)	8
<u>United States vs AnGlada</u> , 524 F.2d 296 (2nd Cir. 1975)	11,12
<u>United States vs Basurto</u> , 497 F.2d 781 (9th Cir. 1974)	9,10
<u>United States vs Bucci</u> , Cr. No. H-75-39	18
<u>United States vs Chow</u> , 398 F.2d 596 (2nd Cir. 1968)	42
<u>United States vs Doe</u> , 361 F. Supp. 226, aff'd 485 F.2d 682 (3rd Cir. 1973)	8
<u>United States vs Dornau</u> , 359 F. Supp. 684 (S.D.N.Y. 1973)	8
<u>United States vs Estepa</u> , 471 F.2d 1132 (2nd Cir. 1972)	9,10

<u>United States vs Febre</u> , 425 F.2d 107 (2nd Cir. 1970)	43
<u>United States vs Gallo</u> , 394 F. Supp. 310 (D.Conn.1975)	9,10
<u>United States vs Guillette</u> , Cr. No. H-524(D.Conn. April 18, 1975)	4,16
<u>United States vs Harris</u> , 521 F.2d 1089 (7th Cir. 1975)	9
<u>United States vs Houle</u> , 490 F.2d 167 (2nd Cir. 1973)	43
<u>United States vs Lazaros</u> , 480 F.2d 174 (6th Cir. 1973)	24
<u>United States vs Martinez</u> (Nos. 76-1236, 1243-8, 2nd Cir. June 4, 1976)	30,31
<u>United States vs Massimo</u> , 432 F.2d 324 (2nd Cir. 1970)	41
<u>United States vs McDaniel</u> , 482 F.2d 305 (8th Cir. 1973)	8
<u>United States vs Pepe</u> , 367 F. Supp. 1365 (D. Conn. 1973)	10
<u>United States vs Polesi</u> , 416 F.2d 573 (2nd Cir. 1969)	9
<u>United States vs Razzaia</u> , 370 F. Supp. 577 (D. Conn. 1973)	35,36
<u>United States vs Seewald</u> , 450 F.2d 1159 (2nd Cir. 1971)	11,12
<u>United States vs Small</u> , 472 F.2d 818 (3rd Cir. 1972)	43
<u>United States vs Terasso</u> , 532 F.2d 1298 (9th Cir. 1976)	31
<u>United States vs Tramunti</u> , 500 F.2d 1334 (2nd Cir. 1974), cert. denied 419 U.S. 1079	7
<u>United States vs Wight</u> , 176 F.2d 376 (2nd Cir. 1949)	40,41
<u>United States ex rel Carthan vs Sheriff, City of New York</u> , 330 F.2d 100 (2nd Cir. 1964)	11
<u>U.S. ex rel Chabonian vs Liek</u> , 366 F. Supp. 72 (E.D. Wisc. 1973)	39

United States ex rel O'Connor vs New Jersey, 405 F.2d  
632 (3rd Cir. 1969) 38

Walker vs United States, 342 F.2d 22 (5th Cir. 1965) 42

Statutes Cited:

18 U.S. C. Section 241	3
18 U.S.C. Section 371	2, 42
18 U.S.C. Section 844 (h) (i)	3
18 U.S.C. Section 1001	2
18 U.S.C. Section 1503	2, 3
18 U.S.C. Section 1623	2
18 U.S.C. Section 3161 <u>et seq.</u>	30
18 U.S.C. Section 3164	30, 31
18 U.S.C. Section 3164(c)	30
18 U.S.C. Section 6002	7
28 U.S.C. Section 1826	6
28 U.S.C. Section 2255	41

Authorities Cited:

American Law Institute, Model Penal Code,  
Section 2.09 (Proposed Official Draft) 25

Wright, Federal Practice and Procedure,  
Crim. Section 599, p. 626 41

UNITED STATES COURT OF APPEALS  
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UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE

VS

JOHN ANTHONY HOUSAND,

DEFENDANT-APPELLANT

BRIEF OF DEFENDANT-APPELLANT

WILLIAM H. CLENDENEN, JR.  
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ISSUES PRESENTED

1. Where Joseph N. Crisafi Had Been Granted Immunity and Was Called as a Defense Witness, Did The District Court Err in Sustaining His Refusal to Testify on Grounds of Self-Incrimination?
2. Where Joseph N. Crisafi Had, Prior to The Trial Resulting in Defendant's Conviction, Testified to The Grand Jury Without a Grant of Immunity, Did The District Court Err in Sustaining His Refusal to Testify at Defendant's Trial on Grounds of Self-Incrimination?
3. Where the Defendant Reasonably Feared That He Would Be Killed in The Future if He Testified Truthfully, Did The District Court Err in Instructing The Jury to Acquit Defendant Only if His False Testimony Had Been Induced by Fear of Immediate, Present and Impending Death or Bodily Injury?
4. Where The Incarcerated Defendant, Despite His Request For a Speedy Resolution, Was Denied a Trial Without Cause For Ten Months Following His Indictment, Was He Deprived of His Sixth Amendment Right to a Speedy Trial?
5. Where The Defendant's Responses to Imprecise and Vague Questions Formed The Basis For His Perjury Indictment, Did The District Court Err in Refusing to Dismiss The Indictment?
6. Where the Government Failed to Establish, on the Record, Defendant's Waiver of His Miranda-Massiah Rights, Did The District Court Err in Permitting the Government to Introduce Defendant's Incriminating Statements Made in The Absence of His Counsel?
7. Was The Defendant Denied The Effective Assistance of Counsel?
8. Did The District Court Err in Refusing to Charge The Jury As to Each Element of The Substantive Offenses Which Were The Objects of The Conspiracy?

Statement of the Case

This appeal by Defendant John Anthony Housand contests the judgment and commitment entered by the United States District Court for the District of Connecticut, Honorable T. Emmet Clarie, Chief Judge after a trial by jury. The Defendant was convicted, on Count I of the indictment, of conspiring with Andrew Bucci\* to give false information to officials of the United States Department of Justice, 18 U.S.C. §1001, and to obstruct and impede the due administration of justice, 18 U.S.C. §1503, all in violation of 18 U.S.C. §371. On Counts II, III and IV of the indictment the Defendant was convicted of knowingly making, under oath, false, material declarations before the grand jury or court of the United States in violation of 18 U.S.C. §1623. R. Doc. Nos. 22, A, 1.

On March 22, 1976, the Defendant was sentenced to five (5) years imprisonment on Count I and five (5) years imprisonment on Count IV to run consecutively to the sentence imposed on Count I.

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\*Mr. Bucci has not been brought to trial on this indictment.  
R. Doc. A.

The Defendant was also sentenced to five (5) years each on Counts II and III, to run concurrently with the sentence imposed on Count IV. The total effective sentence was ten (10) years imprisonment. R. Doc. No. 22. The Defendant is incarcerated at the federal penitentiary at Leavenworth, Kansas. Pursuant to order of this court on July 20, 1976, the Defendant was transferred to the federal correctional institution at Danbury, Connecticut to assist counsel with his appeal.

The facts, briefly stated, are as follows: John Housand was the principal Government witness in the prosecution of David Guillette, Robert Joost, William Marrapese and Nicholas Zinni on an indictment charging in three separate counts: (1) an unlawful combination and conspiracy to deprive Daniel LaPolla of his civil rights, resulting in his death on September 29, 1972, a violation of 18 U.S.C. §241; (2) attempting by force and violence to intimidate and impede a witness in a Court of the United States, in violation of 18 U.S.C. §1503; and (3) using a dynamite bomb to commit a felony, namely, the injury by force of a witness in a Court of the United States, so as to impede, obstruct, and influence the administration of justice in violation of 18 U.S.C. §1503 and in violation of 18 U.S.C. §844(h)(i). The defendants Guillette and Joost were convicted after a jury trial before Judge Clarie at Hartford; while the latter two were convicted

after a jury trial before Judge Murphy at Waterbury. United States v. Guillette, et al, Cr. No. H-524, Ruling on Motion for a New Trial, April 18, 1975, page 1. The effective sentence imposed in all four cases was life imprisonment. United States v. Guillette, supra, page 2.

On or about November 13, 1974, Mr. Housand appeared at the office of the United States Attorney in New Haven, Connecticut in the company of attorneys Andrew A. Bucci and John A. O'Neill, Jr., former defense attorneys in United States v. Guillette, supra, to recant portions of his trial testimony. United States v. Guillette, supra, page 3. Mr. Housand dictated on tape an unsworn statement and responded to questions posed by the United States Attorney. United States v. Guillette, supra.

Mr. Housand was subsequently subpoenaed to appear before a federal grand jury on December 3, 1974, for the purpose of testifying under oath concerning the taped statement and was subjected to further examination. United States v. Guillette, supra, page 5. Mr. Housand exercised his Fifth Amendment rights and refused to testify. At this time, Mr. Housand was being detained under bond as a material witness and was represented by court-appointed counsel. On December 6, 1974, Mr. Housand again appeared before the grand jury and testified in substance to the recantation of his trial testimony. Id.

On December 11, 1974, the grand jury indicted Mr. Housand and Attorney Bucci, together with several other persons, in Criminal No. H 74-185. Appendix 1 B. The indictment was dismissed on the Government's motion on March 21, 1975, Appendix 1 B, p. 5 ; and it was superseded by this indictment wherein only Mr. Housand and Attorney Bucci were named as co-defendants.

I. THE DISTRICT COURT ERRED WHEN IT REFUSED TO ORDER  
JOSEPH N. CRISAFI TO TESTIFY UNDER PENALTY OF CONTEMPT

A. Introduction

On February 5, 1976, the defense called Joseph N. Crisafi to testify concerning Mr. Crisafi's testimony before the grand jury which indicted Mr. Housand. R. Doc. No. 5, Page 841. "Mr. Crisafi appeared and testified on December 16, 1974." Response of the United States to Appellant's Motion for the Disclosure of Sealed Grand Jury Testimony, page 1. On January 31, 1975, Mr. Crisafi received a grant of immunity from Judge Clarie and reappeared and testified before the grand jury. Id. R. Doc. No. 5, page 846. When called by the defense at Mr. Housand's trial, Crisafi claimed the Fifth Amendment privilege against self-incrimination. In the face of the defendant's request that Mr. Crisafi be compelled to testify, R. Doc. No. 5, page 844, Judge Clarie sustained Mr. Crisafi's invocation of the Fifth Amendment privilege. The appellant submits that the District Court erred by sustaining the claimed privilege and refusing the defense request that Mr. Crisafi be compelled to testify or suffer the penalties of contempt, 28 U.S.C. §1826.

B.1. The Grant of Immunity Supplanted Mr. Crisafi's Fifth Amendment Privilege.

The United States Supreme Court has held that a grant of immunity under 18 U.S.C. §6002 is coextensive with the Fifth Amendment privilege against self-incrimination, and suffices to supplant the privilege. Kastigar v. United States, 406 U.S. 441 (1972). In United States v. Tramunti, 500 F.2d 1334, 1342 (2nd Cir. 1974), this Court explained:

"The theory of immunity statutes is that in return for his surrender of his fifth amendment right to remain silent lest he incriminate himself, the witness is promised that he will not be prosecuted based on the inculpatory evidence he gives in exchange. However, the bargain struck is conditioned upon the witness who is under oath telling the truth. If he gives false testimony, it is not compelled at all. In that case, the testimony given not only violates his oath, but is not the incriminatory truth which the constitution was intended to protect. Thus the agreement is breached and the testimony falls outside the constitutional privilege. Moreover by perjuring himself the witness commits a new crime beyond the scope of the immunity which was intended to protect him against his past indiscretions."

With the grant of immunity, Mr. Crisafi's Fifth Amendment privilege was surrendered. Kastigar vs. United States, supra; Goldberg v. United States, 472 F.2d 513 (2nd Cir. 1973); In re Liddy, 506 F.2d 1293 (D.C. Cir. 1974). Neither Mr. Crisafi nor his attorney articulated any basis for invocation of the privilege. The only conceivable reason for the privilege claim is that Mr. Crisafi perjured himself before the grand jury. Even

if this hypothesis is true, it would not allow Mr. Crisafi validly to invoke the privilege. For, immunity

"prohibits the prosecutorial authorities from using the compelled testimony in any respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness."

Kastigar v. United States, supra, 406 U.S. at 453.

Accordingly, in the event of prosecution for false testimony before the grand jury which indicted Mr. Housand, none of the Government's proof could be based upon direct or indirect evidence gained by virtue of Mr. Crisafi's immunized trial testimony. United States v. Alter, 482 F.2d 1016, 1028 (9th Cir. 1973); Kranick v. United States, 343 F.2d 436, 441 (9th Cir. 1965); United States v. Doe, 361 F.Supp. 226, 228, aff'd 485 F.2d 682 (3rd Cir. 1973); United States v. McDaniel, 482 F.2d 305 (8th Cir. 1973); United States v. Dornau, 359 F.Supp. 684 (S.D.N.Y. 1973). Thus Judge Clarie clearly erred by sustaining a non-existent privilege and refusing to compel Crisafi's testimony.

B.2. If Mr. Crisafi Perjured Himself Before the Grand Jury, Mr. Housand Was Entitled to Discover Whether the Government Knew of the Perjury Prior to Trial

If Mr. Crisafi claimed the Fifth Amendment privilege on February 5, 1976, because he had perjured himself before the grand jury, Mr. Housand had grounds to attack the indictment as violative of the Fifth Amendment. Mr. Housand was entitled to an indictment free of false information. United States v. Harris, 521 F.2d 1089, 1091 (7th Cir. 1975); United States v. Estepa, 471 F.2d 1132, 1137 (2nd Cir. 1972). If false information was provided to the grand jury Mr. Housand was entitled to discover whether the Government had any knowledge of Mr. Crisafi's perjury and when it acquired such knowledge. Mesarosh v. United States, 352 U.S. 1 (1956); United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); United States v. Gallo, 394 F. Supp. 310 (D.Conn. 1975), Cf.; Berger v. United States, 295 U.S. 78, 88 (1935); United States v. Polesi, 416 F.2d 573 (2nd Cir. 1969).

B.3. If the Government Knew That Mr. Crisafi  
Perjured Himself Before the Grand Jury, Mr. Housand  
Would be Entitled to a Dismissal of the Indictment\*

If the Government knew that the indictment of Mr. Housand was based partially on Mr. Crisafi's perjured testimony, the Due Process Clause of the Fifth Amendment was violated. United States v. Basurto, supra, 497 F.2d at 785. The prosecutor would be required to inform the court, opposing counsel and the grand jury of the perjury. United States v. Basurto, supra, 497 F.2d at 786 and cases there cited. Permitting a defendant to stand trial on an indictment which to the government's knowledge may have been founded on perjured testimony merits a dismissal of the indictment. United States v. Gallo, 394 F.Supp. 310, 315 (D.Conn. 1975). See also United States v. Pepe, 367 F.Supp. 1365, 1370 (D.Conn. 1973); United States v. Estepa, supra.

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\*On July 1, 1976, the appellant moved for an order requiring disclosure of correspondence which may show that the Government had knowledge of Mr. Crisafi's perjury prior to Mr. Housand's trial. As of this date, the motion has not been decided.

C. Mr. Crisafi Waived His Fifth Amendment Privilege Against Self Incrimination.

The Government advises that Mr. Crisafi appeared and testified before the federal grand jury investigating the recantation of sworn testimony by Mr. Housand on December 16, 1974. Response of the United States to Appellant's Motion for the Disclosure of Sealed Grand Jury Testimony, page 1. The December 16, 1974 appearance occurred before the grant of immunity was issued on January 31, 1975. Id. Mr. Crisafi's testimony before the federal grand jury on December 16, 1974 constituted a waiver of his Fifth Amendment privilege at Mr. Housand's trial. United States ex rel Carthan v. Sheriff, City of New York, 330 F.2d 100, 102 (2nd Cir. 1964); United States v. Seewald, 450 F.2d 1159 (2nd Cir. 1971); United States v. Anglada, 524 F.2d 296, 300 (2nd Cir. 1975); Ellis v. United States, 416 F.2d 791, 805 (D.C. Cir. 1969). It was thus plain error to deny Mr. Housand the opportunity to pursue the contents of Mr. Crisafi's December 16, 1974 grand jury testimony.

D. The District Court's Imprimatur on Mr. Crisafi's Blanket Refusal to Testify Was Plain Error.

Mr. Crisafi's refusal to testify on February 5, 1976 covered questions the answers to which in no way could have incriminated him. For example:

"Q. Mr. Crisafi, have you had occasion to testify before the grand jury with respect to the conspiracy to violate Daniel LaPolla's civil rights, resulting in his death?

A. I invoke the Fifth Amendment to that question.

...

Q. Did you, during that testimony before the grand jury, testify as to any involvement of John Housand?

A. The Fifth. Can I just assume..

...

Q. Have you testified in another grand jury proceeding with respect to Mr. Housand, other than the LaPolla grand jury investigation?

A. The same; I invoke the Fifth."

R. Doc. No. 5, pages 842-843.

The refusal to answer these questions and others posed, R. Doc. No. 5, pages 841, 843, 844, constituted grounds for granting the defense request for an order compelling him to answer or face contempt. United States v. Seewald, supra, 450 F.2d at 1162. For sensitive areas of inquiry, the district court had the power to require defense counsel to pose carefully phrased, limited questions. United States v. Anglada, supra, 524 F.2d at 300. The district court's allowance of Mr. Crisafi's "blanket assertion of privilege" was thus plain error. United States v. Anglada, supra.

E. The District Court Had a Duty to Examine the Sealed Grand Jury Testimony For the Existence of Brady Material.

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The District Court did not examine the grand jury testimony of Mr. Crisafi for the existence of Brady material prior to sustaining Mr. Crisafi's "blanket assertion of privilege" and discharge as a witness. R. Doc. No. 5, pages 847, 846. In fact the Government candidly discloses that it did not provide the District Court with Mr. Crisafi's December 16, 1974 federal grand jury testimony. Response of the United States to Appellant's Motion for the Disclosure of Sealed Grand Jury Testimony, page 1, footnote 1.

II. THE DISTRICT COURT'S INSTRUCTIONS ERRONEOUSLY BARRED THE JURY FROM FINDING THAT HOUSAND HAD BEEN COERCED AND COMPELLED TO GIVE FALSE TESTIMONY

The district court instructed the jury to acquit Housand only if his false testimony had been coerced or compelled by a well-founded fear of present, immediate, and impending death or serious bodily injury. In effect, a verdict of acquittal required the jury to find that Housand's false testimony had been induced by a loaded pistol pointed at his head.

Judge Clarie instructed:

"In order, however, to provide a legal excuse for any criminal conduct, compulsion or coercion must be present and immediate, and of such a nature as to induce a well-founded fear of impending death, or serious bodily injury; and there must be no reasonable opportunity to escape the compulsion, without committing the crime, or participating in the commission of the crime. Fear of injury to others, or to one's property, or to remote bodily harm, do not excuse an offense.

Moreover, in order to constitute a defense to a charge of criminal conspiracy, continuing over a course of weeks or months, the force and fear must continue throughout the period charged, without any reasonable opportunity to escape the commission of the crime or crimes which are the purpose of the conspiracy. In other words, this coercion or compulsion that will excuse the

criminal must be present, immediate and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury, if the act is not done."

R. Doc. No. 8, 1574-1575

This instruction prohibited the jury from finding that Housand's testimony had been coerced by facts, amply documented in the record, reasonably inducing a fear of death or serious bodily harm in the future. Whether Housand faced present, immediate, and impending injury is not dispositive: \* Housand's enemies were dangerous, persistent, and effective men who had, in the past, actually carried out their threats and who -- as Housand and, indeed, public officials well knew -- were capable of doing so again. The district court erred in rejecting Housand's proffered charge which defined coercion to encompass such facts. Defendant's Supplemental Requests to Charge, Nos. 21, 22, R. Doc. N . 13, pp. 11, 12.

The record is replete with facts justifying Housand's fear that violent death was his certain future in the event he

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\*

When the defense called Crisafi to corroborate the immediacy of the threats to Housand's life and safety, the district court improperly excluded such testimony. R. Doc. No. 5, pp 841 et seq. See Section I, supra. Housand believes that Crisafi told the grand jury that Housand would be killed in the courtroom of the United States District Court for the District of Connecticut at Hartford, Connecticut, if he did not recant.

testified truthfully. A key government witness, Daniel LaPolla, had already been killed by Guillette and Joost after repeated attempts. United States vs Guillette et al, Cr. No. H524 (D. Conn.). Despite LaPolla's participation in the United States' witness security program, R. Doc. No. 5, p. 746, he was finally assassinated by bombing. \* Marrapese, a key government witness in this trial, testified to his fear of Guillette:

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\*

Housand had been a key government witness in December, 1973, United States vs Guillette and Joost, Cr. No. H-524 (D. Conn.), concerning his involvement in a conspiracy to kill LaPolla, who had agreed to testify against Guillette and Joost about the theft of M-16 automatic rifles. United States vs Guillette et al, Cr. No. H-524 (D. Conn. April 18, 1975), Ruling on Motion For A New Trial, Clarie, J.

In May 1974, Housand testified similarly against Marrapese and Zinni, co-defendants in H-524. In both trials, Housand testified that Guillette and Joost asked him to kill LaPolla, and that he agreed to do so in the presence of Guillette, Joost, Marrapese and Zinni.

Q (Mr. Heiman) Well, were you afraid of Mr. Guillette?

A Yes, I was afraid of what he might do.

Q He was a violent man, wasn't he, according to your testimony?

A That's correct.

Q Had been involved in planting a bomb that killed somebody?

A That's right.

Q Had been involved in all kinds of illegal activities, according to you?

A That's correct.

Q Been involved in the theft of M-16 rifles, isn't that right?

A That's correct.

Q And you felt, and you still feel now do you not, that he was a violent man, and that your life was in danger?

A That's correct.

R Doc. No. 2, pp. 278.

In fact, Marrapese's fear of Guillette had caused him to sign an affidavit after a visit from Andrew Bucci, Esquire, that Marrapese's prior statement was false and that Guillette had not

been involved in the conspiracy to kill LaPolla.\* R. Doc. No. 2, pp. 275-279. The legitimacy of Marrapese's alarm is confirmed by the Government's placement of him in the witness security program. R. Doc. No. 2, pp. 176, 177, 324. Like Marrapese, Housand too made false statements by reason of a well-apprehended fear of Guillette. And, like Marrapese, Housand too was placed in the witness security program, although at the time of such placement Guillette and Joost were not pointing a loaded pistol at his head. Surely, however, the Government perceived Housand's danger as real, and Housand's fear of death as reasonable: Special Attorney Coffey explained that the reason for such placement was to prevent the witness' being killed. R. Doc. No. 6, p. 925.

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\* In United States vs Andrew Bucci, Cr. No. H-75-39, Bucci was convicted of a conspiracy to obtain a false declaration under oath of Marrapese. Bucci was sentenced to ten days incarceration, execution suspended. We are advised that H-75-39 is on appeal to this court.

Other facts justifying Housand's fear for his life are developed in the record: During the trials in E-524, the Government moved Housand from safe house to safe house. R. Doc. No. 8, pp. 1270-1272. In August 1973, despite elaborate Government efforts to hide him, Mr. Housand was located at the Brooklyn, Connecticut jail by an unidentified person connected with the defense in H-524, R. Doc. 5, pp. 742-3; Agent Petrella instructed Housand to check with ATF agents before speaking with anyone in order to avoid harm. R. Doc. No. 5, pp. 745-746. At one point Housand was severely beaten by someone whom he identified as an associate of Guillette and Joost, and was hospitalized with three broken ribs and a hairline fracture of the upper jaw. R. Doc. No. 7, pp. 1122/<sup>NO.8,</sup> 1295, 1306. Housand had also been held captive in Guillette's house and coerced by Bucci to prepare a statement discrediting the FBI and the Lincoln, Rhode Island police. R. Doc. No. 7, p. 1122. Agent Petrella testified that he was concerned that someone might harm Mr. Housand. R. Doc. No. 5, p. 746. Agent Petrella's concern was based on his experience with the killing of Mr. LaPolla, who, like Housand, had been in the witness security program. R. Doc.

No. 5, p. 746. Special Attorney Coffey, the prosecutor in H-524, also testified as to the Government's knowledge of the danger to Mr. Housand.

Q (Mr. Heiman) Now, with respect to these various meetings and discussions and preparations that you had with Housand, did Housand express some fear about receiving the same fate as that of Daniel LaPolla? Did he ever express that to you?

A Yes, I would say he did.

Q And the people with whom you were dealing, in the prosecution of LaPolla, Joost, Guillette, Marrapese, Zinni; in your judgment were pretty violent people, weren't they?

A Well, I don't know if you can paint them all with the same brush. We felt we had evidence to show that they had been responsible in the homicide of a Government witness. And to that extent they were considered to be very undesirable people in the community.

Q Maybe the word I should have used -- I shouldn't have used "violent"; maybe it should have been "dangerous".

MR. CASEY: I am going to object to any characterization on Mr. Coffey's part, of what he thought of those witnesses.

THE COURT: The Court will allow it. How he characterized them. I see what the defense might be claimed.

MR. HEIMAN: Thank you, your Honor.

THE WITNESS: I thought that Joost and Guillette, that there was an element of danger, personal danger, to anyone who crossed their path, a potential danger. Less so with respect to Mr. Zinni. And Mr. Marrapese was somewhere in the middle -- something of an unknown quantity.

BY MR. HEIMAN:

Q At any rate, at least two of these people, in your judgment, represented a threat -- I think you used the expression anyone who crossed their path. You mean by that anyone who crossed them, or did something which was not going to be favorable to them, by testifying against them?

A That's correct.

R. Doc. No. 6, pp. 948-950.

And

Q (Mr. Heiman) Now, with respect to that second call, or the call involving the automobile, and the talking to people about his involvement; do you recall telling Mr. Housand that there was a good chance of getting himself killed if he went around telling people who he was, and what case he had testified in?

A I said something generally to that effect. I can't say "You'll get yourself killed", but I indicated to him that if he were to go around blabbing off his mouth, he'd be in effect defeating the whole purpose of relocating him under a different name.

Q Mr. Coffey, do you recall testifying on the 18th of February of 1975, before Judge Clarie, and you were asked a question by counsel -- you had been talking about this telephone conversation, and you were asked the question: "What did you say to him about his abusing the situation?"

Do you recall that?

A Yes.

Q Do you recall answering that question -- I'll read it, so it is not taken out of context: "Well, I told him that -- in what I hoped was strong terms -- that he was not to use the

Federal Government or the Marshal's Service or my office, or anyone associated with the case as a reference for purchasing any item, or as a reference for cashing any checks, or anything to deal with monetary considerations. And I also told him there was a good chance of getting himself killed if he went around telling people who he was, and in what case he had testified; that he was just going to make for naught everything we had done as to his relocation."

Do you recall giving that answer?

A Yes, I do.

Q You didn't have any question in your mind at all, did you, that if he went around mouthing off who he was, and telling people he was involved in this thing, that he stood a good chance of getting himself killed?

A I would say to you that that was a possibility -- perhaps a probability. To some extent, of course, it is speculation, and we would not want him to do that.

You are asking me to guess what would happen if he blabbed his mouth, and that could have happened.

Q No, I am not really asking you to guess, Mr. Coffey. What I'm asking you is was your judgment or feeling or opinion at that time -- because you said, "You stand a good chance of getting yourself killed."

A Well, once again, I don't recall specifically saying that he would be killed. I recall admonishing him not to say if he was a witness, because the general concern of being -- his safety could be jeopardized by the fact that he disclosed who he was.

There is no question about that. That is what I told him.

Q And there is no question that on the 18th of February, in response to that question, you did testify "I told him that he stood a good chance of getting killed"?

A Yes, that's correct.

R. Doc. No. 6, pp. 922-924

See, also, Testimony John M. Dowd, Esquire, United States Department of Justice, R. Doc. No. 2, pp. 196-197.

Mr. Housand was incarcerated at the Federal Correctional Institution at Danbury, Connecticut on November 21, 1974 as a material witness. In Civil No. H-75-305, District of Connecticut, Mr. Housand challenged the conditions of his confinement. Mr. Casey on behalf of the Government responded:

"While, Housand is a 'pre-trial detainee' he is also a former key material government witness in a highly controversial murder case with a considerable reputation throughout New England. As such, he is in danger at Danbury and extra precautions must be taken to protect him and to insure his presence at trial...

In the case at bar, we are not dealing with an ordinary 'pre-trial detainee'. The plaintiff, John Housand is in serious danger of being murdered by other inmates. Stringent security measures must be taken to protect his life and to insure his presence at trial. Those measures are being taken..."

Response To Show Cause Orders and Defendants' Motion For Summary Judgment, Civil Action Nos. H-75-305; H-75-306; H-75-225 dated October 3, 1975, pp. 13-A (emphasis supplied.)

The Government took every step necessary, within the judgment of the Witness Security Program personnel, to provide Mr. Housand with a new identity and location. Still Mr. Bucci located Mr. Housand. Under these circumstances, Housand responded to a well-grounded fear for his safety when he agreed to recant his testimony. R. Doc. No. 2, pp. 192, 212, 217.

The district court's instruction, despite its derivation from Shannon vs United States, 76 F 2d. 490, 493 (10th Cir. 1935), failed to permit due consideration of Housand's reasonable fears for his future safety. In United States vs Lazaros, 480 F2d 174, 176 (6th Cir. 1973), an immunized defendant who testified falsely before a grand jury was prosecuted for perjury. The defendant claimed coercion by his fear of being murdered in jail, where an informer had been murdered a week before his false testimony. Although no actual threats were apparently made to defendant, the court held it was proper to instruct the jury that if his false statements were induced by coercion or duress they would not constitute perjury. See, R. I. Recreation Center vs Aetna Casualty & Surety Co., 177 F. 2d 603, 605-607 (1st Cir. 1949). In People vs Colgan, 377 N.Y.S. 2d 602 (App. Div. 1975), the court held it was the jury's function to determine the issue

of coercion where there is threat of future or potential danger.

The American Law Institute has proposed a definition of coercion which is not confined to immediate, impending, and imminent threats. Model Penal Code §2.09 (Proposed Official Draft) states:

(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.\*  
(emphasis added)

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\* The commentary to the section (Tentative Draft 10) explains:

"This is to say law is ineffective in the deepest sense, indeed that it is hypocritical if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such case is found to be an ineffective threat; the standard is not wholly external in its reference; account is taken of the actor's situation".

"Beyond this limitation to coercive force or threats against the person [as opposed to threats against property], we perceive no valid reason for demanding that the threat be one of death or even great bodily harm. That the imperiled victim be the actor rather than another, or that the injury portended be immediate in point of time. It is sufficient in our view that factors such as these be given evidential weight along with the other circumstances, in application of the statutory standard...

We think it obvious that...long and wasting pressure may break down resistance more effectively than a threat of immediate destruction."  
(emphasis supplied)

This court should follow the emerging rule, approved by the American Law Institute, and reverse Housand's conviction.

The district court's instructions were additionally in error. The court stressed that a defendant claiming coercion must show that no reasonable way existed to avoid the harm, other than giving the false testimony. But the court failed to explain that what is reasonable for a defendant like Housand, threatened by an organized criminal combine, differs from reasonable means of avoiding less persistent and less omnipresent danger. The jury may have relied on prosecution evidence that Housand did not ask for the United States Attorney's help, when he was contacted by Bucci and brought to New Haven. In fact, the jury might easily have been influenced by the instructions to disregard evidence that after his testimony and trial Housand had several times contacted Special Attorney Coffey as well as United States Marshalls in order to get better identification and protection. It was not unreasonable for Housand to feel that once discovered by Bucci, he had no way to avoid him and his friends. LaPolla too, had been under protection of the Government and had been killed. But the court failed to inform the jury that despite contact with the Government, there may

have been no realistic opportunity to avoid the danger in this situation.

In conclusion, the district court committed plain error by instructing the jury to consider only danger that was "present , immediate and impending" and "continuing". R. Doc. No. 8, p. 1575. The instruction effectively precludes jury consideration of the legitimate, credible and real fear of Housand that he would be killed unless he perjured himself. Ironically, the Government's own action in protecting Housand from a retaliatory death is withdrawn from the jury's consideration. Mr. Housand respectfully submits that he should be granted a new trial so that the jury can deliberate on all of the evidence of duress.

III. THE DISTRICT COURT DENIED APPELLANT HIS CONSTITUTIONAL  
RIGHT TO A SPEEDY TRIAL

Mr. Housand was denied his constitutional right to a speedy trial during an eleven-month period in which he could have been brought to trial but was not, despite the absence in the record of any reason for delay.

From December 11, 1974\* when he was indicted on Counts 3-6 of a six-count indictment, Appendix 2B, for twelve subsequent months, Housand was continuously detained without being brought to trial, Appendix 1 A \*\*. From May 7, 1975 to June 9, 1975, the Court considered defense motions, all of which were decided by June 9. Appendix 2 A. Twice Housand requested prompt resolution

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\*Mr. Housand was originally incarcerated at the Federal Correctional Institution at Danbury on November 21, 1974, as a material witness. Housand vs United States, Civil No. H-75-305, Ruling on Petition For Damages, Declaratory and Injunctive Relief, pp. 12, February 23, 1976.

\*\* On November 10, 1975, eleven months after the indictment, the case was scheduled for trial but was postponed because defense counsel had other trial commitments that day.

of his case in letters to Judge Clarie, March 24, 1975, R. Doc. No. 2, and June 30, 1975.\*

Barker vs Wingo, 407 U.S. 514 (1972) articulated the parameters of the Sixth Amendment's right to a speedy trial. The request of a defendant for a speedy trial is one of four factors requiring dismissal for lack of prompt resolution. "The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that the failure to assert the right will make it difficult for the defendant to prove that he was denied a speedy trial." Id at 528, 531-2.

The Supreme Court has long recognized that the right to a speedy trial is fundamental. Klopper vs North Carolina, 386 U.S. 213, 223 (1967). The thirteen-month delay, with no indication in the record of a justifiable cause, constitutes a violation of Housand's fundamental constitutional right.

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\* The letter of June 30, 1975 to Judge Clarie is a part of the record in Civil No. H75-305. In this letter, Mr. Housand states: "As stated in previous correspondence to the Court, 'I seek only a ' speedy resolution' in the matters before the Court. That was my desire then, and the same desire exists today."

The time during which defense motions are actively under consideration stop the clock of pertinent time ceilings under the Speedy Trial Act of 1974, 18 U.S.C. §3161 et seq. In Housand's case, all motions made on May 7, 1975 were resolved by June 9, 1975. At most, then, one month and two days of delay were directly attributable to the accused or counsel.\* The record discloses no reasons for the other ten months of delay, twice during which period Housand requested a speedy trial.

In U.S. vs Martinez (Nos. 76-1236, 1243-8, 2nd Cir. June 4, 1976) the Court held that defense counsel's motions relieved the judge from the 18 U.S.C. 3164(c) obligation to dismiss charges against defendants held beyond the 90-day limit while the interim plan period was in effect.\*\* In Martinez, however, the eight

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\* The record, Appendix 2B, reveals that a motion for psychiatric exam was made and granted by Judge Clarie December 17, 1974. The record does not show when the exams were to be held but only that they were to be held at the U.S. prison facility at Danbury. Therefore the amount of time which the record reveals was allotted to this motion was one day - December 17, 1974.

\*\* The time limits of the interim plan section of the speedy trial Act, 18 U.S.C. §3164, do not appear to apply to Housand and are not claimed.

motions filed by defense counsel were concededly the cause of the trial delay beyond the 18 U.S.C. §3164 maximum. Martinez does not stand for the proposition that a defense attorney who files motions which are made, heard and decided within a relatively short time forfeits his client's right to a speedy trial. Rather, Martinez holds that where defense motions admittedly carry the case beyond the speedy trial act limits, the time directly attributable to the consideration of motions must be excluded.

In Strunk vs United States, 412 U.S. 434 (1973), the Supreme Court ordered dismissal of the indictment where the defendant suffered a 10-month delay in being brought to trial. In a unanimous opinion, Chief Justice Burger ordered dismissal in spite of his finding "that petitioner was responsible for a large part of the 10-month delay which occurred" and that Strunk "neither showed nor claimed that the preparation of his defense was prejudiced by reason of the delay". Strunk vs United States, supra, 412 U.S. at 436. Cf United States vs Terasso, 532 F2d 1298 (9th Cir. 1976).

In the present case, Housand was continuously detained eleven months, only one of which was occupied with defense motions, in which he could have been brought to trial. Housand twice requested a speedy resolution of his case. He has thus been denied

his constitutional right to a speedy trial. Therefore, the judgment of conviction must be reversed, and the indictment ordered dismissed.

IV. COUNT II AND IV OF THE INDICTMENT WERE FATALLY DEFECTIVE  
BECAUSE THE QUESTIONS WERE IMPRECISE.

A. Count II

In Bronston v. United States, 409 U.S. 352, 360 (1973) the Supreme Court has emphasized that perjury statutes are not to be loosely construed. And that, the "burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry". Id.

The first question posed in the indictment asks:

"Q. During the trial, who else actually did you tell or in whose presence did you ever say that your testimony was false?"

As there are many trials arising from the conspiracy to deprive Daniel LaPolla of his civil rights, to which trial was the interrogator referring? As Housand had testified on numerous occasions over a number of days, to what testimony is the interrogator referring? Does the interrogator mean all of the testimony, or some of the testimony? If he means only some of the testimony, which parts? Does the interrogator desire to know who was told or, on the other hand, who was present when someone was told something? These are clearly different questions. Presence of a person when a statement is made does not mean necessarily that the person either heard the statement or was told the

statement. In a large room, many persons may be present and, due to a number of circumstances, not hear all or part of a statement. Another question posed in Count II is:

"Q. How about Marshal Paul Connolly?"

The question is simply meaningless. The answer is similarly unenlightening--"He overheard the conversation". What conversation did he overhear? Does the alleged perjury consist of this answer? Was the interrogator asking Housand whether he told Connolly that his "testimony was false"? Was he eliciting Housand's opinion of Paul Connolly's character? At least a thousand meanings can be given to the question "How about Marshal Paul Connolly?"

If the Government wanted to know whether Marshal Connolly was told by Housand that some or all of his testimony was false during trial, the questioner could have focused on a particular trial, a specific portion of the testimony, etc. If the Government wanted to know whether Marshal Connolly was present when someone else was told that some or all of his testimony was false during trial, the questioner could have focused on those present, what was said, and to whom any such statement was made. Instead, the questioner asked "How about Marshal Paul Connolly".

Mr. Housand's response could have meant that Coffey, Petrella, Johnson, Fowler, and Waterson were each told during one of the several trials on the same or various dates that some or all of Housand's testimony before some unspecified tribunal(s) was false; or that they were present when Housand said to one or more of them that some or all of his testimony was false; or that they were present when Housand said to some unidentified person such as his attorney that his testimony, which none of them heard, was false.

As Judge Newman recently commented in a similar context the "impression of the questions left the jury with an insufficient basis reasonably to conclude beyond a reasonable doubt that the third alternative had occurred." United States v. Razzaia, 370 F.Supp. 577, 579 (D.Conn. 1973). For in a prosecution for false swearing the careful use of words becomes important and the foregoing distinctions "are not the stuff of which perjury connections can be made". Id. The judgment of conviction on Count II was plainly erroneous and should be reversed.

B. Count IV

The same fatal defect is present in Count IV of the indictment:

"Q. Did you ever talk about it with Mr. Coffey?

A. I have had conversations with Coffey about it, yes.

Q. Did you tell him that you really hated doing it, you didn't like giving false testimony?

A. First meeting I ever had with Coffey I expressed that concern."

What is the "it" referred to in the foregoing two questions?

If "it" is supposed to refer to the giving of false testimony, there is no admission in the statement that false testimony was in fact given by Mr. Housand. Mr. Housand's answer simply states that he was concerned about giving false testimony. Is this the claimed perjury? Or, is the alleged perjury that Mr. Housand and Mr. Coffey had conversations concerning whether or not Mr. Housand was concerned not to give false testimony? Was there a conversation in which Mr. Coffey advised Mr. Housand not to give false testimony, and Mr. Housand responded that he was concerned not to give false testimony? The indictment is not sufficiently precise to exclude the second alternative. United States v. Razzaia, supra. The judgment of conviction on Count IV was plainly erroneous and should be reversed.

V. THE GOVERNMENT'S USE OF HOUSAND'S STATEMENTS OF FEBRUARY 14, 18 and 19, 1975 VIOLATED THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

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It is axiomatic that the Sixth Amendment's right to counsel is violated when federal agents deliberately elicit incriminating statements from a defendant already under indictment. Massiah v United States, 377 U.S. 201 (1964).

Mr. Housand was indicted on December 11, 1974. Appendix 1 B. On February 14, 1975, Housand was interviewed by FBI agents. R. Doc. No. 4, p. 632. Although defendant's attorneys were present at the beginning of the February 14 interview, they left after approximately 15 minutes. R. Doc. No. 4, p. 634. While there is testimony that the court-appointed attorneys advised Housand on how to conduct himself during the interview, R. Doc. No. 4, pp. 635-6, they left Housand when the FBI agents actually began to interrogate him. R. Doc. No. 4, p. 636. While the record is not totally clear concerning the initiation of the questioning, Special Attorney Dowd testified that the meeting was "mutually instigated", and that the Government "certainly was interested in getting to the bottom of the matter." R. Doc.

No. 2, p. 202. However, the Miranda-Massiah protections are not waived even if it were clear that only the defendant initiated the meeting. Beatty vs United States, 389 U.S. 45 (1967) (per curiam), reversing, 377 F 2d 181 (5th Cir 1967). Nor is the Massiah rule confined to instances of surreptitious or hidden government interrogation. McLeod vs Ohio, 381 U.S. 356 (1965) (per curiam), reversing, State vs McLeod 1 Ohio St2d60, 203 NE 2d 349 (1964); U.S. ex rel O'Connor vs New Jersey, 405 F 2d 632, 636 (3rd Cir. 1969); Hancock vs White, 378 F2d 479 (1st Cir. 1967).

The Government presented some evidence that Housand "signed an interrogation advice of rights form on February 14, 1975", R. Doc. No. 5, pp. 624-5; but the document was not introduced nor do its contents appear of record. Nor was there testimony that after being advised of his Miranda-Massiah rights, Housand gave "a clear, explicit and intelligent waiver." U.S. ex rel O'Connor vs New Jersey, supra, 405 F2d 636; Johnson vs Zerbst, 304 U.S. 458 (1933); Miranda v Arizona, 384 U.S. 436, 475 (1966). Nor does the apparent acquiescence of Housand's court-appointed attorneys in the first interrogation on February 14 constitute a waiver by Housand of his Miranda-Massiah rights. U.S. ex rel

Chabonian vs Liek, 366 F. Supp. 72, 76 (E.D. Wisc. 1973). Without a clear showing of a knowing waiver of his Miranda-Massiah rights, it was error for the District Court to admit Housand's incriminating statements of February 14, 1975.

Error was also committed in the admission of Housand's February 18 and 19, 1975 incriminating statements. Agent Marotta testified that Housand had been advised of his rights each day, R. Doc. No. 4, pp. 627, 630, but did not explain why Housand did not sign an advice of rights form as he allegedly did on February 14, 1975. Similarly, there was no proof that Housand clearly and explicitly waived his Miranda-Massiah rights on either February 18 or 19, 1975. The Government thus failed to carry its heavy burden of a clear, explicit and intelligent waiver of Housand's Miranda-Massiah rights. The judgment of the district court should be reversed and a new trial ordered in which the statements made by Housand on February 14, 18 and 19, 1975 must be excluded.

VI. THE DEFENDANT CLAIMS TO HAVE BEEN INEFFECTIVELY REPRESENTED BY COUNSEL IN THE PROCEEDINGS BELOW. THIS COURT SHOULD REMAND TO THE DISTRICT COURT TO CONDUCT A HEARING AND MAKE A RECORD ON HIS CLAIM.

On March 18, 1976, Housand filed a petition for a writ of habeas corpus challenging, among other claims, the competency of pre-trial and trial counsel. The petition was assigned Civil No. H-76-138. On March 23, 1976 Chief Judge Clarie denied the petition without prejudice, remarking that the "allegation of incompetency of pre-trial and trial counsel...are more appropriately a part of the petitioner's appellate rights". Ruling on Motion to Vacate Judgment, March 23, 1976.

The determination of whether there has been ineffective assistance of counsel is a two-stage process:

(1) The defendant must make a prima facie showing that the assistance has been inadequate; and,

(2) There was sufficient prejudice to defendant under all the circumstances of the trial as to make the proceedings "a farce and mockery of justice."

Massimo vs United States, 339 F. Supp. 519, 526 (S.D.N.Y. 1972), aff'd. on other grounds, 463 F.2d 1171 (2d Cir. 1972). See McMann vs Richardson, 397 U.S. 759, 771 n.14 (1970); United States vs

Wight, 176 F. 2d 376, 379 (2d Cir. 1949).

Defendant's appellate counsel believe that the record is insufficient to resolve the Defendant's claim concerning ineffective assistance of counsel. The Defendant therefore requests that this Court adopt Judge Friendly's suggestion in dissent in United States vs Massimo, 432 F.2d 324,327 (2nd Cir.1970) and vacate the judgment and remand the case to the trial judge for further inquiry.\*

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\* The Defendant would be eligible to file a petition pursuant to 28 U.S.C. §2255 and receive an evidentiary hearing on their claims unless the motion, files, and records of the case conclusively showed that he is entitled to no relief. See, Sanders vs United States, 373 U.S. 1 (1963); Machibrada vs United States, 368 U.S. 487, 494 (1962); 2 Wright, Federal Practice and Procedure, Criminal §599, p. 626 (1969). The Defendant makes the suggestion for remand at this stage in order to expedite the final resolution of his claims and to save the Government needless time and expense caused by multiple hearings and appeals.

VII. THE DISTRICT COURT'S INSTRUCTIONS FAILED TO SPECIFY EACH ELEMENT OF THE SUBSTANTIVE OFFENSE CHARGED AS THE OBJECTS OF THE CONSPIRACY.

The district court's instructions on the conspiracy count failed to specify each element of the federal issues which were the objects of the alleged conspiracy. Since the essence of conspiracy, 18 U.S.C. 371, is an agreement to commit another federal crime\*, the jury must be informed of the elements of the substantive offense in order to determine whether such an agreement in fact exists.

The case at bar differs from those cases which hold that the conspiracy charge need not delineate the elements of the substantive criminal object of the illegal agreement. Walker v. United States, 342 F.2d 22 (5th Cir. 1965); United States v. Chow, 398 F.2d 596 (2nd Cir. 1968). In those cases, the defendants were tried for substantive offenses which were identical to the crimes alleged as the object of the conspiracy. Hence the jury

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\*See Ingram v. United States, 360 U.S. 672, 677-678 (1958): "It is fundamental that a conviction for conspiracy under 18 U.S.C. 371 cannot be sustained unless there is 'proof of an agreement to commit an offense against the United States.'" (quoting Pereira v. United States, 347 U.S. 1, 12 (1954)).

was informed of the essential elements of the substantive offense at another point in the court's instructions.\* In the case at bar, however, the crimes charged as the objects of the conspiracy differed from the substantive counts of the indictment. Therefore, the jury could not refer to another portion of the instruction in order to determine all of the essential elements of the offenses charged as the objects of the illegal agreement. In effect, the elements of the criminal object of the conspiracy are elements of the conspiracy offense. Failure to specify all of the elements of the conspiracy counts is plain error and requires reversal of the conspiracy conviction. United States v. Houle, 490 F.2d 167 (2nd Cir. 1973); United States v. Small, 472 F.2d 818 (3rd Cir. 1972).

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\*In United States v. Febre, 425 F.2d 107 (2nd Cir. 1970), the failure to instruct the jury that a finding of possession was necessary for a conviction on the conspiracy count, as well as for conviction of the substantive count of possession of illegal drugs, was not error where the jury could refer to the charge on the substantive count.

C O N C L U S I O N

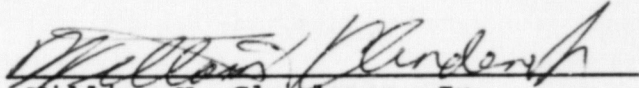
For the foregoing reasons, the judgment of conviction and the commitment should be reversed.

Respectfully submitted,

THE DEFENDANT-APPELLANT

Dated: July 26, 1976

By:

  
William H. Clendenen, Jr.

David M. Lesser

CLENDENEN & LESSER

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New Haven, Connecticut 06510

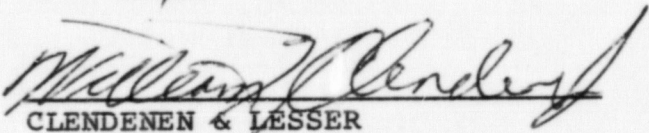
203/787-1183

CERTIFICATION:

This is to certify that a copy of the foregoing was mailed, postage prepaid, to:

Peter Casey, Esquire  
United States District Court  
U.S. Courthouse  
450 Main Street  
Hartford, Connecticut

this 26 day of July, 1976.

  
CLENDENEN & LESSER